

October 1980

Criminal Prosecution under the Federal Water Pollution Control Act

Sharon Nelson Kahn

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Sharon N. Kahn, *Criminal Prosecution under the Federal Water Pollution Control Act*, 56 Chi.-Kent L. Rev. 983 (1980).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol56/iss3/10>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

CRIMINAL PROSECUTION UNDER THE FEDERAL WATER POLLUTION CONTROL ACT

United States v. Frezzo Brothers

602 F.2d 1123 (3d Cir. 1979), *cert. denied*,
48 U.S.L.W. 3535 (U.S. Feb. 19, 1980)

Although criminal prosecutions are authorized under the Federal Water Pollution Control Act of 1972,¹ civil actions have remained the enforcement norm. Recently, however, federal prosecutors have begun to apply criminal remedies as a method to prompt polluters to clean up.²

*United States v. Frezzo Brothers*³ demonstrates the potential of criminal prosecution. In *Frezzo*, a family owned enterprise permitted manure-rich waters to flow into a stream. The United States Environmental Protection Agency⁴ had never promulgated effluent limitations⁵ or other regulations applicable to the defendants' business, nor had it issued any abatement order or other prior notice that defendants might be in violation of the FWPCA.⁶ Nevertheless, the United States Attorney obtained convictions⁷ and the United States Court of Appeals for

1. 33 U.S.C. §§ 1319, 1321 (1976 & Supp. 1977). The Federal Water Pollution Control Act of 1972 is hereinafter referred to as FWPCA.

2. See, e.g., *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977); *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979); *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (E.D. Ark. 1978); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975). See also *Wall St. J.*, Oct. 3, 1979, at 21, col. 2.

The Justice Department moved to strengthen its enforcement of laws dealing with pollution and hazardous waste. . . .

[The holder of] a newly created post of Deputy Assistant Attorney General in the department's Land and Natural Resources Division. . . . will oversee a new hazardous-waste section, along with the department's existing pollution-control section [and] will also supervise all of the division's criminal prosecutions.

Attorney General Benjamin Civiletti said that 20 lawyers will be added to the division's staff to aid enforcement efforts.

These management moves follow months of discussion within the department about the need for tougher enforcement of environmental laws.

3. 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980).

4. The United States Environmental Protection Agency is charged with implementation of the act. 33 U.S.C. § 1251(d) (1976). Hereinafter that agency will be referred to as the EPA.

5. Effluent limitation is defined as follows:

The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.

33 U.S.C. § 1362(11) (1976). See *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204-05 (1976); *Ford Motor Co. v. EPA*, 567 F.2d 661, 673 (6th Cir. 1977) (Engel, J., dissenting); see text accompanying notes 45-50 *infra*.

6. 33 U.S.C. § 1251 (1976 & Supp. 1977).

7. *United States v. Frezzo Bros.*, 461 F. Supp. 266 (E.D. Pa. 1978).

the Third Circuit affirmed the convictions.⁸

Frezzo lays a foundation for increased federal prosecution and jail sentences for polluters. This comment will discuss federal water pollution laws preceding the FWPCA, the enforcement scheme of the FWPCA, and various cases illustrating its implementation. Next, the *Frezzo* case will be presented and analyzed. Finally, the potential impact of the *Frezzo* decision upon future prosecutions will be considered.

DEVELOPMENT AND ENFORCEMENT OF WATER POLLUTION LEGISLATION

The Federal Water Pollution Act of 1948

Prior to the 1970's, federal water pollution enforcement "relied almost exclusively on negotiation, public pressure, and voluntary compliance."⁹ The first federal statute intended to remedy water pollution was the Federal Water Pollution Act of 1948.¹⁰ This act and its amendments provided for an extended "conference procedure" as a means of enforcement.¹¹ This procedure required conferences among the dischargers of pollutants and all control agencies in the region¹² followed by an informal hearing "intended to resolve pollution problems by conciliation and coordination, rather than by enforcement sanctions."¹³ These procedures delayed any enforcement for at least two years and the only enforcement available then was an injunction.¹⁴ During the twenty-four years of the existence of this legislation prior to passage of the FWPCA, this procedure resulted in but one case reaching court.¹⁵ That case was settled by a consent decree.

8. *United States v. Frezzo Bros.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980).

9. Glenn, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 AM. CRIM. L. REV. 835, 836 (1973) [hereinafter cited as Glenn].

10. The Federal Water Pollution Act of 1948 declared that it was the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution." 33 U.S.C. § 466 (1964). Thus, although this act was a first step, the Congress had not thrown the full force of the federal government behind efforts to control water pollution.

11. See 1 F. GRAD, ENVIRONMENTAL LAW 2-75 (2d ed. 1978) [hereinafter cited as GRAD]; S. REP. NO. 414, 92d Cong., 1st Sess. 2, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3669, where the committee report traces the major amendments to the 1948 act prior to the FWPCA.

12. *Id.*

13. *Id.*; see S. REP. NO. 414, 92d Cong., 1st Sess. 5, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3668, 3672.

14. *Id.*

15. In that case, *United States v. City of St. Joseph*, Docket No. 1077 (W.D. Mo. St. Joseph Div. 1961), the polluter was dumping over five million tons of raw sewage a day during the four years which elapsed between the initial conference and the consent decree.

The principal weaknesses of this act were that the government was required to give a violator 180 days notice prior to initiating court action; the act applied only to interstate waters, which comprise only about fourteen percent of all waters in the United States; and the act provided for the establishment of "stream standards" for a body of water and not effluent standards, which are prescribed for the source of the discharge.¹⁶

The Refuse Act

Dissatisfaction with the Federal Water Pollution Act of 1948 led to the dusting off of an older piece of legislation which was originally designed to prevent obstruction of navigable waters.¹⁷ This legislation, the Rivers and Harbors Act of 1899,¹⁸ made it illegal to discharge or deposit "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom . . . into any navigable waters."¹⁹ From its inception until the late 1960's, the so-called Refuse Act was almost exclusively used to prosecute creators of obstructions or impediments to anchorage or navigation.²⁰ However, during the 1960's, several United States Supreme Court cases began to expand application of the Refuse Act to prohibit pollution.

In the first of these cases, *United States v. Republic Steel Corp.*,²¹ the Court interpreted the Refuse Act as applying to the discharge of liquid wastes containing suspended solids which had not blocked navigation or anchorage.²² This decision was expanded by the Court in *United States v. Standard Oil Co.*,²³ where the defendant claimed that the gasoline he had spilled into a waterway could not come within the scope of the Refuse Act because it was a valuable commodity.²⁴ The

16. Druley, *The Refuse Act of 1899*, 2 ENV. REP. Monograph No. 11 (1972) [hereinafter cited as Druley].

17. *Id.*

18. 33 U.S.C. § 407 (1976).

19. *Id.*

20. See, e.g., *United States v. Ballard Oil Co.*, 195 F.2d 369 (2d Cir. 1952); *United States v. Moran*, 113 F. 172 (S.D.N.Y. 1901); *United States v. Marthinson*, 58 F. 765 (E.D.S.C. 1893) (predecessor to the Refuse Act of 1899 not directed to floating logs because they were not a permanent obstruction); *United States v. Burns*, 54 F. 351 (D.W. Va. 1893) (predecessor to the Refuse Act of 1899).

Furthermore, the Army Corps of Engineers, charged with administration of the Refuse Act, continued to emphasize the statute's application to impediments to navigation even after United States Supreme Court decisions in the 1960's to the contrary. See text accompanying notes 21-27 *infra*.

21. 362 U.S. 482 (1960).

22. *Id.* at 490.

23. 384 U.S. 224 (1966).

24. *Id.* at 225.

Court rejected this defense, stating that "[t]his case comes to us at a time where there is greater concern than ever over pollution—one of the main threats to our free-flowing rivers and to our lakes as well."²⁵ Furthermore, *Standard Oil* provided a foundation for the imposition of strict liability under the Refuse Act since the Court had reinstated an indictment charging that the defendant had merely "allowed" the gasoline to enter the waterway.²⁶ Consequently, civil and criminal liability have been imposed under the Refuse Act without a showing of intent, knowledge, or negligence.²⁷

While these decisions greatly expanded the potential reach of the Refuse Act and led to significant enforcement, the Refuse Act was still not widely utilized. In the early 1970's, however, public pressure caused the agency charged with its administration, the Army Corps of Engineers, to establish a permit system under the statute.²⁸ Further im-

25. *Id.* Justice Douglas, writing for the majority, continued:

The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress had not acted nor in stretching statutory language in a criminal field to meet strange conditions. But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history. We cannot construe § 13 [33 U.S.C. § 407] of the Rivers and Harbors Act in a vacuum.

Id. at 225-26.

Lower courts also expanded their application of the Refuse Act. *See, e.g.*, *United States v. Esso Standard Oil Co.*, 375 F.2d 621 (3d Cir. 1967) (liquid petroleum products); *United States v. Consolidation Coal Co.*, 354 F. Supp. 173 (N.D.W. Va. 1973) ("effluent wastes"); *United States v. Granite State Packing Co.*, 343 F. Supp. 57 (D.N.H.), *aff'd*, 470 F.2d 203 (1st Cir. 1972) (blood, manure, and grease); *United States v. Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill. 1969) (iron particles and oily substance).

26. 384 U.S. at 225. *See Olds, Unkovic & Lewin, Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Water Acts*, 17 DUQ. L. REV. 1, 3 (1977) [hereinafter cited as Olds].

Although the *Standard Oil* Court specifically declined to reach the liability question, 384 U.S. at 230, the facts of the case provided a basis for a strict liability interpretation. *See United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974), where the court cited *Standard Oil* in applying strict liability in a criminal prosecution.

27. *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974). In that case, the court examined the standard of liability necessary for criminal prosecution under the Refuse Act. Defendant corporation operated an oil tank farm near the Boston harbor. Over a period of years, oil had accumulated underground. This oil percolated through the soil and entered the harbor. In explaining the policy behind strict liability, the court stated:

Merely to attempt to formulate, let alone apply [a due care defense] would be to risk crippling the Refuse Act as an enforcement tool. The defendant, if a substantial business enterprise, would usually have exclusive control of both the expertise and the relevant facts; it would be difficult indeed, and to no purpose, for the government to have to take issue with elaborate factual and theoretical arguments concerning who, why and what went wrong. . . . [W]e see no unfairness in predicating liability on actual non-compliance rather than either intentions or best efforts. . . . Whatever occasional harshness this could entail is offset by the moderateness of the permitted fine, the fact that the statute's command—to keep refuse out of the public waters—scarcely imposes an impossible burden, and the benefit to society of having an easily defined, enforceable standard which inspires performance rather than excuses.

Id. at 623 (footnote omitted).

28. Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (Dec. 25, 1970) established a permit system

petus to enforcement occurred in 1970 when United States Attorneys were given guidelines for criminal and civil enforcement actions.²⁹ These guidelines authorized prosecutors to initiate criminal actions against "occasional polluters" on their own, without approval from the Corps.³⁰

The promise of expanded application of the Refuse Act was soon thwarted, however, by several court decisions.³¹ For instance, in *Kalur v. Resor*,³² a federal district court enjoined the issuance of discharge permits under the Refuse Act until the Corps of Engineers amended its permit regulations to require the preparation of environmental impact statements in conformance with the National Environmental Policy Act.³³ This requirement was a substantial barrier to the implementation of the Corps' permit system as a means of dealing with pollution. Additionally, *Kalur* held that the Refuse Act permit system did not apply to non-navigable tributaries of navigable waters.³⁴

A second decision impairing the Refuse Act as a means of curbing pollution was *United States v. Pennsylvania Industrial Chemical Corp.*³⁵ In that case, defendant was charged with violating section 13 of the Refuse Act by dumping liquid industrial wastes without a permit.³⁶ The Court rejected defendant's contention that its failure to obtain a permit was excusable because the Corps of Engineers had no formal permit program at the time of the dumping.³⁷ However, the Court accepted as an admissible defense the defendant's claim that it had been "affirmatively misled" by the Corps' longstanding administrative con-

under the Refuse Act, as referred to in section 13 of the statute. 33 U.S.C. § 407 (1970). Permits were to be issued by the Secretary of the Army after consultation with the administrator.

During the years 1971 and 1972, there were about 300 criminal convictions under section 13 of the Refuse Act, 33 U.S.C. § 407 (1970), and over 120 civil actions. 118 CONG. REC. S.33,705 (Oct. 4, 1972) (remarks of Senator Griffin). Most of these resulted in either the stopping of dumping or the installation of pollution controls. *Id.*

29. Druley, *supra* note 16, at 6-7.

30. *Id.* See, e.g., *United States v. Standard Brands, Inc.*, No. 70 Cr.858 (S.D.N.Y. Dec. 7, 1970). However, the primary enforcement tool utilized under the Refuse Act was the injunction. Druley, *supra* note 16, at 8. See, e.g., *United States v. Armco Steel Corp.*, 333 F. Supp. 1073 (S.D. Tex. 1971).

31. See *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

32. 335 F. Supp. 1 (D.D.C. 1971).

33. 42 U.S.C. §§ 4321-4327 (1976). The filing of a detailed environmental impact statement is required under the National Environmental Policy Act when major federal action is anticipated to have an effect on the environment. *Id.* § 4332.

34. 335 F. Supp. at 10-11. See Glenn, *supra* note 9, at 852-53.

35. 411 U.S. 655 (1973).

36. 33 U.S.C. § 407 (1976); see text accompanying note 19 *supra*.

37. 411 U.S. at 659. A permit system was instituted in December of 1970. See note 28 *supra*.

struction of section 13 as limited to impediments to navigation.³⁸ The Court allowed this defense, despite its own and other court decisions which had interpreted the Refuse Act far more broadly than the Corps' regulations.³⁹ The Court stated that the defendant "had a right to look to the Corps of Engineers' regulations for guidance."⁴⁰

The judicial limitations placed upon the Refuse Act in *Kalur* and *Pennsylvania Industrial Chemical* gave impetus to passage of the FWPCA. With the passage of the FWPCA, the Refuse Act became limited to curtailing discharges which are of an isolated rather than a continuous nature and which have an effect upon navigation or anchorage.⁴¹

The Federal Water Pollution Control Act of 1972

The FWPCA of 1972 was an advance over all pre-existing federal water pollution control legislation.⁴² The act's stated goal is to eliminate the discharge of pollutants into navigable waters by 1985.⁴³ This was to be accomplished by the establishment of a permit system requiring polluters to use the "best technology available" to reduce their discharge of pollutants by 1977.⁴⁴

Briefly, the act operates as follows: The administrator establishes guidelines to be used in promulgating national effluent limitations.⁴⁵

38. 411 U.S. at 670.

39. *Id.* at 674. See, e.g., *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

40. 411 U.S. at 674.

41. 33 U.S.C. § 1371(b) (1976). The Refuse Act is expressly preserved by 33 U.S.C. § 1371(a)(2)(B) (1976). The Refuse Act permit system was eclipsed by the National Pollution Discharge Elimination System provided for in 33 U.S.C. § 1342(a)(5). However, the Army Corps of Engineers still issues permits for dredged or fill material. *Id.* § 1344. Also, actions pending under the Refuse Act at the time of passage of the FWPCA were preserved. *Id.* § 1251. See *United States v. Rohm & Haas Co.*, 500 F.2d 167 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Consolidation Coal Co.*, 354 F. Supp. 173 (N.D.W. Va. 1973).

42. See *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200 (1976); Arnold, *Effluent Limitations and NPDES: Federal and State Implementation of the Federal Water Pollution Control Amendments of 1972*, 15 B.C. IND. & COM. L. REV. 767 (1974).

43. 33 U.S.C. § 1251 (a)(1) (1976).

44. That section provides in part:

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title

Id. § 1311(b)(1)(A).

However, amendments to the FWPCA in 1977 changed the deadline and the standards to be applied to discharges. *Id.* § 1311(b)(2) (Supp. 1977). The amendments provided that effluent limitations require application of the "best conventional pollutant control technology" by July 1, 1984. *Id.* § 1311(b)(2)(E).

45. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), for extensive analysis of the FWPCA.

These guidelines describe factors which the EPA must consider in determining permissible levels of discharge. These factors include variables such as the age of the discharging facility and the technological process being used by that facility.⁴⁶ Based upon these and other factors detailed in the guidelines, the administrator promulgates national effluent limitations which establish a range of permissible discharge levels for classes and categories of point sources.⁴⁷ The EPA, or if the state has an EPA-approved plan, the state, may then issue permits to individual point sources.⁴⁸ These permits entitle the permit holder to discharge in conformance with levels established by the national effluent limitations.⁴⁹ If the operator of a particular point source believes that he cannot conform to the standards set forth in the national effluent limitations, he may apply to the permit-issuing body for a variance. If the state, rather than the federal EPA, has authorized a variance, that variance is subject to federal approval.⁵⁰

The focus of the act's enforcement is section 1319. This section provides that any person who violates compliance orders, the operative sections of the act, or a permit condition may be subject to a civil penalty not to exceed \$10,000 per day of such violation.⁵¹ Civil actions

46. 33 U.S.C. § 1314(b) provides in part:

For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of [enactment of this title], regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise.

For the years of struggle to determine how this section interacted with section 1311 and other sections of the act, *see* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977); American Iron & Steel Inst. v. EPA, 526 F.2d 1027 (3d Cir. 1975); CPC Int'l, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975); Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692 (D.C. Cir. 1975).

Although the policies and concepts are a vast improvement over previous legislation, the FWPCA has been described as a "poorly drafted and astonishingly imprecise statute." E.I. du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1026 (4th Cir. 1976), *aff'd*, 430 U.S. 112 (1977). The FWPCA has led to many conflicting interpretations and "virtually every exercise of the [EPA's] discretion has precipitated protracted litigation." Republic Steel Corp. v. Train, 557 F.2d 91, 94 (6th Cir. 1977), *vacated and remanded*, 434 U.S. 1030 (1978).

47. 33 U.S.C. § 1314 (1976).

48. Section 1342(a)(1) provides that the administrator may:

[I]ssue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318 and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Id. § 1342(a)(1).

49. For a more detailed discussion of the permit application procedure, *see* Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1378 (D.C. Cir. 1977); Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977).

50. *See* 33 U.S.C. § 1342(d) (1976).

51. Section 1319(d) provides:

may also be brought against municipalities and a state may be joined as a party.

The act also includes three provisions for criminal liability. One provides for a maximum \$10,000 fine and/or a maximum of six months in jail for false statements.⁵² A second penalizes failure to notify the government of a harmful spill of oil or hazardous substance with a maximum \$10,000 fine and/or imprisonment up to one year.⁵³ The third, section 1319(c)(1), is a general criminal sanction which provides:

Any person who wilfully or negligently violates section[s] . . . of this title, or any permit condition or limitation . . . issued . . . by the Administrator or by a State . . . shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both.⁵⁴

The FWPCA corrects many of the problems confronted when earlier legislation was used to remedy water pollution. For example, unlike the Water Pollution Act of 1948, the FWPCA provides for

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed \$10,000 per day of such violation.

Id. § 1319(d).

52. Section 1319(c)(2) provides:

Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

Id. § 1319(c)(2). See *United States v. Little Rock Sewer Comm.*, 460 F. Supp. 6 (E.D. Ark. 1978). In that case, individual members of a volunteer town board "clearly lacked any personal knowledge of the false statements" made by a city employee to the EPA. *Id.* at 8. Nevertheless, the court found the town board criminally liable for those statements under 33 U.S.C. § 1319(c)(2) on a theory of respondeat superior. The board was held vicariously liable for the negligent or wilful statements of its high level employee.

53. Section 1321(b)(5) provides:

Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

33 U.S.C. § 1321(b)(5) (1976).

54. *Id.* § 1319(c)(1).

limitations to be placed upon the sources of pollution regardless of the quality of the water into which the pollutants were discharged.⁵⁵ The earlier act had permitted discharging unless water quality standards were violated.⁵⁶ Secondly, the FWPCA applies to navigable waters of the United States, a provision which has been interpreted extremely broadly, even to the point of including dry gullies.⁵⁷ Furthermore, unlike the Refuse Act, the FWPCA permit system and other EPA action under the act is specifically exempted from the requirement that environmental impact statements be filed by the agency.⁵⁸

As for enforcement, the FWPCA scheme depends upon "rapid access" to the federal courts,⁵⁹ a vast improvement over the lengthy conference procedure of the Water Pollution Act of 1948.⁶⁰ Also, the FWPCA civil and criminal enforcement provisions compare favorably to those in the Refuse Act.⁶¹ For example, the Refuse Act provides for strict liability in both criminal and civil actions and permits a maximum fine of \$2,500.⁶² In contrast, the FWPCA imposes strict liability only in civil actions,⁶³ but provides for substantially greater fines than those in the Refuse Act.⁶⁴ Thus, the FWPCA is intended to make polluting an uneconomical proposition.⁶⁵ However, unlike the Refuse

55. *Id.* § 1311(b).

56. Druley, *supra* note 16, at 1.

57. *See* United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1184-87 (D. Ariz. 1975), where the court stated that:

For the purposes of this Act to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into *any waterway*, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters.

Id. at 1187 (emphasis in original).

58. 33 U.S.C. § 1371(c)(1) (1976).

59. S. REP. NO. 414, 92d Cong., 1st Sess. 65, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3731. *See* United States v. Detrex Chem. Indus., Inc., 393 F. Supp. 735, 737 (N.D. Ohio 1975), where the court stated that "the legislative history of the Acts reveal congressional concern over the apparent insufficiency of penalties provided to encourage compliance prior to the 1972 amendments."

60. *See* text accompanying notes 9-15 *supra*.

61. 33 U.S.C. § 407 (1976); *see* text accompanying notes 18-27 and 32-40 *supra*.

62. 33 U.S.C. § 410 (1976).

63. 33 U.S.C. § 1319(d) (1976); *see* note 51 *supra*. *See, e.g.*, United States v. Marathon Pipeline Co., 589 F.2d 1305, 1308-10 (7th Cir. 1978), where a fine was assessed against an owner who was in no way at fault in not learning of an oil spill and in no way caused it.

64. *Compare* 33 U.S.C. § 1319(d) (1976) (\$10,000 fine) with 33 U.S.C. § 410 (1976) (\$2,500 fine).

65. *See* United States v. Detrex Chem. Indus., Inc., 393 F. Supp. 735, 738 (N.D. Ohio 1975). There the EPA sought to have a fine levied for each violation, rather than on a per day basis. The court held that "while a \$10,000 per violation per day penalty would also tend to effectuate the congressional enforcement purpose, the truly devastating impact of such a construction on business is not what Congress intended. Such a rule would tend more towards confiscation than mere deterrence." *Id.*

Act, criminal violations under the FWPCA are not based upon strict liability.⁶⁶ The government must show that the violation was either negligent or willful.⁶⁷ Jail sentences as provided in both statutes are similar—up to one year for first-time offenders.⁶⁸

An additional enforcement provision in the FWPCA not provided for in earlier legislation is a form of "blacklisting."⁶⁹ This FWPCA provision prohibits any federal agency from procuring goods and services from a person convicted of a criminal offense under the act.

ENFORCEMENT ACTION UNDER THE FWPCA

The above FWPCA enforcement provisions reflect congressional intent to toughen sanctions against polluters.⁷⁰ These provisions rely primarily upon enforcement of effluent limitations, which are imposed upon dischargers via permits.⁷¹ As long as a discharger remains in compliance with his permit, he is deemed to be in compliance with the act.⁷² A violation of a permit condition subjects a discharger to enforcement provisions. This is also the case where limitations are applicable to a discharge and where the discharger has not obtained a permit.⁷³

While this enforcement scheme can be simply stated, it has led to many questions of statutory interpretation.⁷⁴ For one, a number of cases have arisen where there are no effluent limitations or other regulations which are applicable to the discharge at issue.⁷⁵ Courts have

66. 33 U.S.C. § 1319(c) (1976); see text accompanying note 54 *supra*. The Clean Air Act has a scienter requirement that the violation be "knowing" before criminal sanctions may be imposed. Since liability for "knowing" conduct is a tougher test than "negligent" conduct, it would seem that criminal liability "may be imposed under the Water Act on a lesser showing of culpability than under the Air Act." Olds, *supra* note 26, at 15.

67. 33 U.S.C. § 1319(c)(1) (1976); see text accompanying note 54 *supra*.

68. 33 U.S.C. §§ 410, 1319(c)(1) (1976).

69. *Id.* § 1368(a). For a discussion of this provision, see *Air and Water Act Enforcement Problems—A Case Study*, 34 BUS. LAW. 665, 671 (1979). This statute has been expanded by executive order to require compliance with the act as a condition to an agency contract. Furthermore, EPA's regulations implementing this order provide that federal, state, or local criminal convictions or administrative findings of non-compliance may serve as a basis for blacklisting a facility. *Id.*

70. *United States v. Detrex Chem. Indus., Inc.*, 393 F. Supp. 735, 737 (N.D. Ohio 1975); Glenn, *supra* note 9, at 835-38.

71. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977).

72. 33 U.S.C. § 1342(k) (1976). See note 171 *infra*.

73. See *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977); 40 C.F.R. § 124.11(a) (1979).

74. See note 46 *supra*.

75. See, e.g., *United States v. Hudson Farms, Inc.*, 12 E.R.C. 1444 (E.D. Pa. 1978); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

disagreed as to whether enforcement procedures can be instituted against the discharger in this situation.

A Texas federal district court addressed this question in *United States v. GAF Corp.*⁷⁶ In *GAF*, defendant chemical company had applied for a permit to dump chemical wastes into a deep well. The government, without taking action on the permit application, sought to enjoin the dumping under 1319(b), which provides for appropriate civil relief for violations.⁷⁷ The government asserted that the dumping would violate section 1311(a). This section provides that, except in compliance with the act, "the discharge of any pollutant by any person shall be unlawful."⁷⁸ The government maintained that dumping would violate section 1311(a) *per se*, regardless of the facts that no applicable effluent limitations had been established and that defendant's permit had not been acted upon by the EPA.⁷⁹

The *GAF* court rejected the government's contention that the broad prohibition in section 1311(a) could be enforceable where applicable effluent limitations had not been promulgated.⁸⁰ The court stated that enforcement action must be based upon a failure to comply with promulgated regulations or with other sections of the act that specifically prohibit certain discharges.⁸¹ Furthermore, the court stated that the government's interpretation of the act would lead to an "intolerable outcome."⁸² According to the *GAF* court, the intolerable outcome of enforcement of section 1311(a) *per se* would be that "every person and enterprise in the country [would have] to affirmatively comply with one

76. 389 F. Supp. 1379 (S.D. Tex. 1975).

77. Section 1319(b) provides:

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

33 U.S.C. § 1319(b) (1976).

78. Section 1311(a) provides:

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Id. § 1311(a).

79. 389 F. Supp. at 1386. *See United States Steel Corp. v. Train*, 556 F.2d 822, 851-53 (7th Cir. 1977) (steel company's discharge of chemical wastes into deep well properly regulated under FWPCA); 33 U.S.C. § 1342(b)(1)(D) (1976) which gives the administrator the authority to promulgate effluent limitations pertaining to deep wells.

80. The *GAF* court also denied the injunction on the ground that the disposal of chemical wastes into a deep well did not constitute a discharge of pollutants within the meaning of section 1311(a). 389 F. Supp. 1383-85.

81. *Id.* at 1386.

82. *Id.*

of the enumerated sections before discharging any pollutant.”⁸³

Rather than reach this result, the court outlined either of two ways in which a person could comply with the FWPCA: A person could never contravene an effluent limitation, or he could comply with the conditions and limitations of his permit.⁸⁴ Apparently piqued that the government was seeking enforcement where no regulations applied, the court concluded that the government was trying to “avoid the legal consequences of the Administrator’s dalliance by proposing the *per se* interpretation of § 1311(a).”⁸⁵ The court stated that its decision merely denied to the administrator “the freedom to restructure the FWPCA to cover what would appear to be his procrastination.”⁸⁶

The decision in *GAF* was relied upon by the Sixth Circuit in *Republic Steel Corp. v. Train*.⁸⁷ In *Republic Steel*, the administrator objected to a permit issued by the Ohio EPA on the ground that the state agency had improperly waived the July 1, 1977 deadline. That date was statutorily designated as the date by which the permit-issuing authority should require dischargers to employ the “best practicable control technology currently available.”⁸⁸ The state-issued permit had allowed Republic to continue discharging at levels above those achievable by the best practicable technology past July 1, 1977.

Republic, possessing a state-issued permit, contended that the state was entitled to extend compliance with the FWPCA beyond the deadline because, at the time the permit was issued, there were no effluent limitations defining the “best practicable technology” discharge levels for Republic’s business.⁸⁹ The Sixth Circuit held that the inability of the federal EPA to promulgate timely standards foreclosed the imposi-

83. *Id.* at 1385.

84. *Id.* at 1386. See also *United States v. Olin Corp.*, 465 F. Supp. 1120 (W.D.N.Y. 1979). In *Olin*, defendant corporation and individual defendants sought to dismiss an indictment charging them with twenty-eight counts of making false statements to the EPA in violation of 18 U.S.C. § 1001 (1976) and 33 U.S.C. § 1319(c)(2) (1976). See note 52 *supra*. These charges pertained to reports which defendant voluntarily filed prior to obtaining a permit to discharge. The defendants argued that the administrator could have enforced section 1319 even if defendant had not been issued a permit. Consequently, defendants claimed, the general section 1001 counts should be dismissed as section 1319(c)(2) preempted application of that statute on the facts before the court. The court disagreed and interpreted section 1319 as applying “only . . . when the Administrator finds that a violation of a permit condition or of a particular section of the Act has occurred.” 465 F. Supp. at 1131.

85. 389 F. Supp. at 1387.

86. *Id.* Other courts have been less intolerant of delay. See, e.g., *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1379 (D.C. Cir. 1977).

87. 557 F.2d 91, 95 (6th Cir. 1977), *vacated and remanded*, 434 U.S. 1030 (1978).

88. 33 U.S.C. § 1311(b)(1)(A) (1976); see note 44 *supra*.

89. 557 F.2d at 95.

tion of the statutory deadline upon Republic. Citing *GAF*,⁹⁰ the court stated that "federal regulations must exist before dischargers can be compelled to honor dates for implementing them."⁹¹

In another case where there was an absence of EPA regulations, *Ford Motor Co. v. EPA*,⁹² the Sixth Circuit reviewed the administrator's veto of a state-issued permit. There the court set aside an EPA veto of a state-approved permit on the grounds that the veto was invalid because it "was not based upon any published regulation or guideline or express statutory provision."⁹³

The practical effect of the holdings in *GAF*, *Republic Steel*, and *Ford* is that, unless a discharge is expressly prohibited by EPA regulation or the act, the administrator is powerless to limit water pollution.⁹⁴ This result has led to other courts taking a contrary position.⁹⁵ These

90. *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975); see text accompanying notes 76-86 *supra*.

91. 557 F.2d at 95. While this case was pending, the EPA completed and issued regulations applicable to defendant's business. *Id.*

On certiorari to the United States Supreme Court, the Sixth Circuit's decision was vacated and remanded for reconsideration in light of the 1977 amendments to the FWPCA. 434 U.S. 1030 (1978). The 1977 amendment which required vacation of *Republic* specifically gave the administrator discretionary authority to grant an extension beyond the July 1, 1977 deadline. 33 U.S.C. § 1319(a)(5)(B) (Supp. 1977). This amendment allowed the administrator to extend compliance up to but not later than April 1, 1979 in situations where dischargers were making good faith efforts to comply.

The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

Id.

92. 567 F.2d 661 (6th Cir. 1977).

93. *Id.* at 662. See also *Washington v. EPA*, 573 F.2d 583 (9th Cir. 1978). In that case, the state, under an EPA-approved permit system, issued a permit to a paper company for discharge of sulphite wastes into the Puget Sound. However, the EPA had not issued applicable effluent limitation guidelines under 33 U.S.C. § 1314 (1976), see note 46 *supra*, for use by the permit issuer. The EPA challenged the state's authority to issue a permit where the EPA had not established guidelines and attempted to veto the permit under 33 U.S.C. § 1342(d) (1976). The court held that "as a matter of statutory interpretation the Administrator's exercise of the veto power conferred by section [1342(d)] is contingent upon the antecedent formulation of guideline regulations." 573 F.2d at 589.

94. See *Ford Motor Co. v. EPA*, 567 F.2d 661, 672 (6th Cir. 1977) (Engel, J., dissenting).

95. *E.g.*, *American Frozen Food Inst. v. Train*, 539 F.2d 107 (D.C. Cir. 1976); *South Carolina Wildlife Fed. v. Alexander*, 457 F. Supp. 118, 124-27 (D.S.C. 1978); *United States v. Hudson Farms, Inc.*, 12 E.R.C. 1444, 1446 (E.D. Pa. 1978); *United States v. Holland*, 373 F. Supp. 665, 668 (M.D. Fla. 1974).

courts have enforced the broad prohibition in section 1311(a) that "the discharge of any pollutant by any person shall be unlawful" on a *per se* basis.⁹⁶ These decisions sometimes enforce section 1311(a) on this basis with little or no discussion.⁹⁷ For example, in *United States v. Holland*,⁹⁸ a Florida district court enjoined dumping on the basis of section 1311(a), referring to that section as the "enforcement hub" of the act.⁹⁹ Another case which discusses section 1311(a) is *American Frozen Food Institute v. Train*.¹⁰⁰ Although not an enforcement case, the United States Court of Appeals for the District of Columbia Circuit noted there that the broad prohibition in section 1311(a) "is central to the entire act [and] is statutory and requires no promulgation."¹⁰¹

In another case, the District of Columbia Circuit again offered support for a finding that section 1311(a) is enforceable *per se*. In that case, *Natural Resources Defense Council, Inc. v. Costle*,¹⁰² an environmental group challenged EPA regulations which exempted certain agricultural and other discharges from permit requirements. The District of Columbia Circuit held that these regulations went beyond the EPA's authority because the "legislative history makes clear that Congress intended [permits] to be the only means by which a discharger . . . may escape the total prohibition of [section 1311(a)]."¹⁰³ Therefore, if the administrator does not have the power to officially exempt certain discharges by regulations, it follows that the mere absence of regulations limiting discharges cannot amount to an exemption from enforcement of the act.

A second question which has confronted the courts when inter-

96. See note 78 *supra*.

97. See *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977), a criminal action where the defendant was seen turning on a gasoline pump which gushed onto a frozen lake. Defendant was convicted under section 1319(c)(1). See text accompanying note 54 *supra*. On appeal, defendant claimed that he had been improperly charged and that he should have been charged with either a violation of the Refuse Act or section 1321 of the FWPCA which specifically prohibits any discharge of petroleum products. 551 F.2d at 109. In relying only on section 1319(c)(1), the prosecutor was required to show that defendant's alleged actions violated section 1311(a), which provides that "[e]xcept as in compliance with [the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (1976). The court concluded that the negligent or wilful violation of section 1311(a) could be the basis of a criminal action. 551 F.2d at 110. The court stated that this comported with precedent that "water pollution legislation [should] be given a generous rather than a niggardly construction." *Id.* at 112, citing *United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966); *United States v. Republic Steel Corp.*, 362 U.S. 482, 491 (1960); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974).

98. 373 F. Supp. 665 (M.D. Fla. 1974).

99. *Id.* at 668.

100. 539 F.2d 107 (D.C. Cir. 1976).

101. *Id.* at 128.

102. 568 F.2d 1369 (D.C. Cir. 1977).

103. *Id.* at 1374.

preting the enforcement mechanism of the act is whether the administrator has a mandatory duty to issue an abatement order to a discharger in violation of the act. This question centers upon interpretation of section 1319(a)(3), which provides that whenever the administrator finds that a person is in violation of section 1311(a) or any permit provisions, conditions, or limitations, the administrator "shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action."¹⁰⁴ The question whether this section imposes a mandatory duty upon the administrator has arisen in two contexts. First, if this section does create a mandatory duty, the act provides that a citizen may bring suit against the administrator to carry out that duty.¹⁰⁵ Citizens, usually environmental groups, have advocated that the administrator's duty under section 1319(a)(3) is mandatory and they have sued to enforce that duty.¹⁰⁶ Second, defendants in criminal prosecutions under the act have defended on the ground that the administrator must issue an abatement order or take civil action before pursuing criminal remedies.¹⁰⁷

In the first context, the courts have been divided as to whether a citizen's civil action may compel the EPA to issue an abatement order to a violator.¹⁰⁸ The only circuit court of appeals to decide this issue,

104. Section 1319(a)(3) provides:

Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3) (1976).

105. Section 1365(a) provides that a citizen may commence a civil action against any person (including the United States or its agencies) when an effluent limitation or an order issued by an administrator has been violated. 33 U.S.C. § 1365(a)(1) (1976). An action may be commenced against the administrator if there is "alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." *Id.* § 1365(a)(2).

106. *See, e.g.,* *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *South Carolina Wildlife Fed. v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978); *Illinois ex rel. Scott v. Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977).

107. *See, e.g.,* *United States v. Frezzo Bros.*, 602 F.2d 1123 (3d Cir. 1979); *United States v. Hudson Farms, Inc.*, 12 E.R.C. 1444 (E.D. Pa. 1978); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975).

108. Section 1319(a)(3) is also discussed in *United States v. Detrex Chem. Indus., Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975), in a different setting. There, the administrator issued defendant an abatement order in March requiring the defendant to comply by May 7. After issuing the order and prior to May 7, the administrator began a civil action. Defendant claimed that until the compliance date on the abatement order was passed, he was immune from other enforcement action. The court held to the contrary, stating:

The language of section 1319(a)(3) does not establish mutually exclusive alternatives; rather Congress thereby sought to reduce the case load of the courts where administrative action would suffice to effectuate compliance. To rule otherwise, would reward vio-

the Fifth Circuit, held that the duty of the administrator to issue an abatement order under section 1319(a)(3) is discretionary rather than mandatory.¹⁰⁹ Two trial courts deciding this question have held that the act mandates some type of action by the administrator when he finds that a discharger is in violation of the act.¹¹⁰

In the second context, that of a criminal prosecution, the few reported opinions dealing with this question have held that there is no mandatory duty for the EPA to issue an abatement order or institute a civil suit prior to taking criminal action.¹¹¹ In *United States v. Phelps Dodge Corp.*,¹¹² defendant was criminally charged with negligently or wilfully discharging pollutants into a normally dry arroyo in violation of FWPCA sections 1311(a)¹¹³ and 1319(c).¹¹⁴ The defendant sought to have the charges dismissed on the grounds that the administrator had failed to issue an abatement order prior to instituting criminal action.¹¹⁵

In determining whether section 1319(a)(3)¹¹⁶ imposes prerequisites to filing a criminal action under section 1319(c), the Arizona district court in *Phelps* turned to the act's legislative history. During Senate consideration of the act, Senator Edmund Muskie, one of the key proponents of the FWPCA, explained that "the provisions requiring the Administrator to issue an abatement order whenever there is a violation [are] mandatory."¹¹⁷ Although this statement lends support to the argument that there are prerequisites to a criminal suit, the court looked to other portions of the legislative history which suggested a contrary conclusion.¹¹⁸ In the final House committee report, the administrator's enforcement options were described in the alternative.

lators of the Act by forgiving penalties incurred where the administrator has invoked this congressionally approved procedure, thereby effectively discouraging the utilization of said procedure.

Id. at 738.

109. *Sierra Club v. Train*, 557 F.2d 485, 491 (5th Cir. 1977).

110. *E.g.*, *South Carolina Wildlife Fed. v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978); *Illinois ex rel. Scott v. Hoffman*, 425 F. Supp. 71 (S.D. Ill. 1977). However, both of these courts indicated that the *type* of enforcement action pursued was discretionary with the administrator. *See South Carolina Wildlife Fed. v. Alexander*, 457 F. Supp. 118, 132-34 (D.S.C. 1978).

111. *See* note 107 *supra*.

112. 391 F. Supp. 1181 (D. Ariz. 1975).

113. *See* note 78 *supra*.

114. *See* text accompanying note 54 *supra*.

115. 391 F. Supp. at 1183.

116. *See* note 104 *supra*.

117. 391 F. Supp. at 1183, *quoting* A LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, U.S. GOVERNMENT PRINTING OFFICE 174 [hereinafter cited as LEGISLATIVE HISTORY].

118. 391 F. Supp. at 1184.

The administrator's duties were such that "he may take any of the following enforcement actions: (1) he shall issue an [abatement order]; (2) he shall notify [the violator] . . . or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings."¹¹⁹ The *Phelps* court interpreted these "conflicting" portions of legislative history to mean that "while the Administrator *must* act in case of [*sic*] any violation, he has alternative methods of acting; i.e., either by civil or criminal proceedings. He is not required to proceed first to effect a correction by civil means before instituting criminal proceedings."¹²⁰

UNITED STATES V. FREZZO BROTHERS

Facts of the Case

Frezzo Brothers was a family operated business engaged in mushroom growing and manure composting. Compost was prepared by recycling water from a holding tank through a mixture of hay and manure.¹²¹ On six different dates, manure-rich water overflowed the holding tank into a nearby stream. This flowage was traced to the Frezzo farm by a county health official. Upon investigation, a company officer admitted that the holding tank could control the water

119. H. REP. NO. 911, 92d Cong., 2d Sess. 114 (1972). That House report states:

Whenever on the basis of any information available to him the Administrator finds that anyone is in violation of [the Act] he *may* take *any* of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation. . . . [If the state does not commence action within 30 days after notification,] the Administrator shall issue an order requiring such person to comply with a permit or a condition or limitation of a permit; *or* (3) he shall bring a civil action; *or* (4) he shall cause to be instituted criminal proceedings.

Id., reprinted in LEGISLATIVE HISTORY, *supra* note 117, at 801-02 (emphasis added).

120. 391 F. Supp. at 1184. *Accord*, United States v. Hudson Farms, Inc., 12 E.R.C. 1444 (E.D. Pa. 1978). In *Hudson Farms*, a Pennsylvania district court relied on *Phelps* in denying a motion to dismiss an indictment based on the administrator's admitted failure to issue an abatement order prior to criminal prosecution. The court denied the motion, stating that:

[Section 1319(c)] makes no mention of a prerequisite of Administrator action. This implies a congressional intent not to impose such a prerequisite.

In short, although the question is, indeed, a close one, under all the existing law it would appear that defendant's motion should be denied.

Counsel for defense have cited no controlling authority to counter this conclusion and what little authority that exists tends to support it.

Id. at 1448.

However, the *Hudson Farms* court noted that certain dicta to the contrary existed: "Whenever a violation of the FWPCA is directed to the attention of the Administrator, he is directed either to issue an abatement order, which is ultimately enforceable by a criminal prosecution, or to institute a civil suit for enforcement." *Id.* at 1445, quoting *Illinois ex rel. Scott v. Hoffman*, 425 F. Supp. 71, 77 (S.D. Ill. 1977).

121. Tons of horse manure are routinely purchased as the main ingredient for the compost. The defendants made more income from selling compost to other mushroom growers than they did from selling mushrooms. Telephone interview with Bruce Chasan, Assistant United States Attorney, Eastern District of Pennsylvania (April 7, 1980).

"only 95 percent of the time."¹²²

On the basis of this information and lab analysis of samples of the discharges, the company and two of its officers were indicted on six counts of negligently or wilfully discharging a pollutant into a waterway in violation of section 1311(a)¹²³ and 1319(c)¹²⁴ of the FWPCA. Four counts of wilful violations rested upon measurements of discharge on days when there was no rain. Two counts of negligent violations rested upon evidence gathered on rainy days. Defendants had never applied for a permit. Prior to indictment, defendants had not been issued an abatement order nor had any civil action been taken against them. Furthermore, the EPA had not promulgated any effluent limitations or other regulations applicable to compost manufacturing.

Defendants' motion to dismiss was denied and a jury convicted defendants on all counts.¹²⁵ Prior to sentencing, motions for judgment of acquittal were denied.¹²⁶ The individual defendants were each sentenced to thirty-day jail terms and fined an aggregate of \$50,000. The corporate defendant was also fined \$50,000. On appeal, the United States Court of Appeals for the Third Circuit affirmed the conviction.¹²⁷

Reasoning of the Court

In reviewing the conviction of the *Frezza* defendants, the Third Circuit was faced with two main issues: first, whether the EPA may proceed under the act against a discharger although it has not promulgated applicable effluent limitations,¹²⁸ and second, whether the EPA must give notice of the alleged violation or institute civil action before commencing criminal prosecution.¹²⁹ The Third Circuit was the first circuit court of appeals to consider these issues in a criminal prosecution.

In determining whether the administrator was required to give notice, issue an abatement order, or take civil action before pursuing criminal remedies under section 1319(c), the court first examined the wording of that criminal provision. There the statute provides that wil-

122. *United States v. Frezzo Bros.*, 602 F.2d 1123 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980).

123. *See* note 78 *supra*.

124. *See* text accompanying note 54 *supra*.

125. *United States v. Frezzo Bros.*, 461 F. Supp. 266 (E.D. Pa. 1978).

126. *Id.*

127. *United States v. Frezzo Bros.*, 602 F.2d 1123 (3d Cir. 1979).

128. *Id.* at 1127-28.

129. *Id.* at 1125-27.

ful or negligent violators of the act "shall" be punished by imprisonment, fine, or both.¹³⁰ The court also considered the wording of section 1319(a)(3), which provides that violators "shall" be served an abatement order or civil action "shall" be brought against them.¹³¹ The defendants argued that without section 1319(a)(3) notification prior to the institution of criminal proceedings that they were in violation of the act, there could not be a showing that their actions were wilful violations of the act.¹³² In determining the effect, if any, of section 1319(a)(3) upon section 1319(c), the court, drawing from *Phelps*,¹³³ relied on the final House committee report. There the enforcement actions that the administrator "may" take were described in the alternative, and included a range of notices, civil actions, or criminal proceedings.¹³⁴

The court considered this committee report to have greater weight than a subsequent statement by Senator Muskie that an abatement order or civil action was mandatory under the act.¹³⁵ The court stated that the Senate had acceded to the House in not imposing mandatory prerequisites to enforcement.¹³⁶ Further, the court stated:

[W]e see no reason why the Government should be hampered by prerequisites to seeking criminal sanctions under the Act. . . . [I]n view of the broad responsibilities imposed upon the Administrator . . . he should be entitled to exercise his sound discretion as to whether the facts of a particular case warrant civil or criminal sanctions.¹³⁷

Moreover, the court stated that this holding was consistent with the desire of Congress to strengthen the ability of the government to pursue criminal remedies for water pollution.¹³⁸ A contrary holding, the court stated, "would be inconsistent with the Congress' desire for a stronger enforcement mechanism."¹³⁹

On the second issue facing the court, whether the promulgation of effluent limitations was a prerequisite to enforcement action, the defendants argued that before a violation of section 1311(a) could occur,

130. See text accompanying note 54 *supra*.

131. See note 104 *supra*.

132. 602 F.2d at 1126.

133. See text accompanying notes 112-20 *supra*.

134. 602 F.2d at 1126; see note 119 *supra* and accompanying text.

135. 602 F.2d at 1126.

136. *Id.*

137. *Id.* at 1126-27 (footnotes omitted).

138. *Id.* See also *United States v. Hamel*, 551 F.2d 107, 113 (6th Cir. 1977), where the court stated that "Congress intended a more severe penalty [than that available in the Refuse Act] in the event that the discharge was deliberate and wilful."

139. 602 F.2d at 1126.

defendants must have been shown to have not complied with an existing effluent limitation. They contended, relying chiefly on *GAF*, that applicable limitations were a prerequisite to enforcement.¹⁴⁰

The government countered that *GAF* was incorrectly decided. It argued that section 1311(a) was by itself an enforceable prohibition upon all discharges of pollutants. In attempting to rebut the holding in *GAF* that such a proposition would be intolerably burdensome, the government outlined the correct procedure as follows: Where no effluent limitations have been established for a particular business, a discharger should apply for a permit to discharge pollutants under section 1342(a), which allows the administrator to establish interim operating conditions pending permit approval.¹⁴¹ If this procedure were not adopted by the court, the government argued, the absence of effluent limitations would nullify the act.

In weighing these arguments, the *Frezza* court looked to the policies of the act. The court found that the basic policy of the act was to "halt uncontrolled" discharges.¹⁴² The court could see nothing in the act which restricted enforcement efforts to situations where effluent limitations had been promulgated.¹⁴³ The court held that even where no such regulations had been promulgated, violations could be punished. Without this flexibility, the court stated, "numerous industries not yet considered as serious threats to the environment may escape administrative, civil, or criminal sanctions merely because the EPA has not established effluent limitations."¹⁴⁴ Further, these unregulated industries would be able to continue polluting until the administrative process was able to fix effluent limitations. Such a result, the court held, "would be inconsistent with the policy of the Act."¹⁴⁵

The *Frezza* court, unlike the court in *GAF*, did not find enforcement prior to the establishment of applicable regulations to be "unduly burdensome."¹⁴⁶ The court suggested that a business, prior to discharging pollutants, should apply for a permit regardless of whether applicable effluent limitations had been promulgated. This procedure would prompt the administrator to consider promulgation of perma-

140. *Id.* at 1127. See text accompanying notes 76-86 *supra*.

141. 602 F.2d at 1127. See the text of 33 U.S.C. § 1342(a)(1) (1976) *supra* note 48. That section provides that the administrator may impose such conditions as "are necessary to carry out" the provisions of the act.

142. 602 F.2d at 1128.

143. *Id.* Thus, section 1311(a) could be enforced *per se* "even though no effluent limitations have been promulgated for the particular business charged with pollution." *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

nent effluent limitations applying to the entire industry. The court added that, in appropriate cases, the permit applicant would be protected from liability during the pendency of the permit application.¹⁴⁷

In contrast to this procedure, the court stated, the interpretation of the act urged by the defendants would have allowed them to continue polluting until effluent limitations for the entire composting business were promulgated. The court rejected this interpretation, stating: "[The] EPA cannot be expected to have anticipated every form of water pollution through the establishment of effluent limitations. . . . [In this case] the government's intervention by way of criminal indictments brought to a halt potentially serious damage to the stream in question."¹⁴⁸

ANALYSIS

Prosecution of defendants in *Frezzo* resulted in jail sentences for individuals who were pursuing a legal business, albeit in violation of the FWPCA.¹⁴⁹ In this respect, *Frezzo* is unusual because although criminal enforcement has been available against polluters for about fifteen years under the Refuse Act¹⁵⁰ and for seven years under the FWPCA,¹⁵¹ criminal prosecution has not been widely employed and jail sentences rarely have been imposed.¹⁵² The *Frezzo* holdings, which eliminate regulations and notice as prerequisites to criminal prosecution, will likely smooth the way for further criminal proceedings.¹⁵³ These holdings will best achieve the sweeping goal of the act: to elimi-

147. *Id.* See text accompanying notes 169-82 *infra*.

148. *Id.*

149. See text accompanying notes 126-27 *supra*.

150. Although criminal enforcement has been available under the Refuse Act since its inception, the statute was not applied to pollution until the *Republic Steel* and *Standard Oil* cases. See text accompanying notes 21-27 *supra*.

151. See text accompanying notes 42-54 *supra*.

152. See *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974). Several factors have retarded the use of criminal sanctions. The most basic factor is that violators of pollution laws have not been generally regarded as criminals. Comment, *The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977*, 12 SAN FRAN. L. REV. 437, 444 (1978). This perception makes it less likely that enforcers will choose to indict rather than warn or enjoin and it makes juries less willing to convict. *Id.* See Glenn, *supra* note 9, at 835-37. Further inhibiting criminal prosecution is that many polluters are corporations. While corporations are easier to sue than individuals, obviously they cannot be imprisoned and hence a criminal prosecution is only minimally more stigmatizing than civil actions. Furthermore, culpable individuals within the corporation may be difficult to locate. In any case, criminal proceedings usually require a showing of scienter which is not an element in civil actions. Finally, criminal prosecutions entail more constitutional protections for defendants than civil actions. Olds, *supra* note 26, at 13.

153. Two similar criminal actions have been filed in the same federal district of Pennsylvania. *United States v. Hudson Farms, Inc.*, 12 E.R.C. 1444 (E.D. Pa. 1978), discussed in note 120 *supra*;

nate pollution by 1985.¹⁵⁴ They are in harmony with the proposition that in the FWPCA, the "Congress . . . made a legislative determination that polluters rather than the public should bear the costs of water pollution."¹⁵⁵ Seen in this light, the *Frezza* decision interprets the FWPCA logically and correctly.

On the issue of whether effluent limitations are a prerequisite to enforcement, the *Frezza* holding is correct because of the result to which a contrary holding would lead. As an example of a contrary result, the *GAF* court punished the public by permitting continued pollution because the promulgation of effluent limitations was overlooked or delayed.¹⁵⁶ This reasoning ignores the fact that some of the delays involved in the promulgation of effluent limitations have been justified by "technological and administrative restraints."¹⁵⁷ These delays were apparently foreseen by Congress since permits may be issued prior to the promulgation of effluent limitations.¹⁵⁸ The act provides that, prior to the promulgation of effluent limitations under section 1311(a), the state or the EPA may impose such "terms and conditions in each permit as [the Administrator] determines are necessary to carry out the provisions of the Act."¹⁵⁹ Thus, administrative delays in the promulgation of regulations need not lead to the continued pollution by a discharger who is immune from enforcement procedures.¹⁶⁰

Another factor supporting the *Frezza* interpretation is that the

United States v. Oxford Royal Mushroom Products, Inc., No. 79-211 (E.D. Pa. Sept. 24, 1979). For a discussion of *Oxford Royal*, see 10 ENV. REP. 2005 (Feb. 15, 1980) and *id.* 2095 (Mar. 7, 1980). In *Oxford Royal*, the individual and corporate defendants pleaded guilty. A plea bargain agreement was reached where the corporation was fined \$100,000 and the corporate president was fined \$100,000 and sentenced to probation for five years. *Id.* at 2095.

154. 33 U.S.C. § 1251(a)(1) (1976).

155. United States v. Marathon Pipeline Co., 589 F.2d 1305, 1309 (7th Cir. 1978).

156. See text accompanying notes 81-86 *supra*.

157. Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1378-79 (D.C. Cir. 1977).

158. *Id.*

159. 33 U.S.C. § 1342(a)(1) (1976). See note 48 *supra*.

160. See also *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135-36 (1976), where the Court held that even though Congress may have intended effluent limitations to be promulgated within one year of passage of the act, the administrator's interpretation of the act allowing for later promulgation would be accepted. In construing the FWPCA as the administrator suggested, the Court quoted an earlier decision where the Court also accepted the administrator's construction:

We therefore conclude that the Agency's interpretation . . . was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.

Id. at 134-35, quoting *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975).

FWPCA provides that until December 31, 1974, a timely permit applicant was entitled to complete immunity from enforcement action.¹⁶¹ Thus, the FWPCA did not demand immediate cessation of discharge upon passage of the act as the only means of compliance with section 1311(a). Rather, the legislative scheme was to gradually impose increasingly strict discharge limitations upon permit holders. Under the *Frezzo* interpretation, section 1311(a) acts as a stopgap provision where dischargers have not come under the umbrella of the permit system.

Nevertheless, the contrary interpretation finds support in a number of cases.¹⁶² Among those cases is *Stream Pollution Control Board v. United States Steel Corp.*,¹⁶³ relied upon by the *Frezzo* defendants.¹⁶⁴ In that case, the Seventh Circuit states in dictum that an enforceable section 1311(a) *per se* ban on discharges where there are no regulations would be contrary to the entire legislative scheme.¹⁶⁵ Such

161. 33 U.S.C. § 1342(k) (1976). For text of the statute, see note 171 *infra*. See Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 696 (D.C. Cir. 1975), where the court stated:

The timetable for permit issuance is set forth in section [1342(k)]. For the first 180 days after the enactment of the statute, the discharge of any pollutant shall not be a violation of the Act if the discharger applies for a permit within the 180 day period. Until December 31, 1974, the pendency of an application for a permit containing the necessary information for processing of the application will prevent a polluter from being in violation of the permit requirement. After December 31, 1974, the Act contemplates that all discharges from point sources shall be made in conformity with a permit. The permits may be issued by the states under approved programs or by the Administrator in the absence of a state program. The Act vests the Administrator with the final review authority for permits issued by the states.

Id. (footnotes omitted).

162. See notes 76-93 *supra* and accompanying text.

163. 512 F.2d 1036 (7th Cir. 1975).

164. Brief for Appellant at 12.

165. 512 F.2d at 1042. In *Stream Pollution Control Board*, a private citizen sought to intervene in a common law public nuisance action brought by a state agency against United States Steel Corporation. No federal effluent limitations had been promulgated at the time the common law action was brought. Furthermore, United States Steel's permit application was pending with the EPA at the time of the suit. *Id.* at 1041 n.12.

The court recognized that under 33 U.S.C. § 1365(b)(1)(B) (1976) a private citizen may intervene if the action was brought to require compliance with a "standard, limitation, or order" within the meaning of the act. *Id.* at 1041. In order to bring the action within the scope of the statute, petitioner argued that defendant was in violation of section 1311 of the act. The private citizen argued that there could be a violation regardless of whether effluent limitations had been promulgated. The court rejected this argument, stating:

We think defendant is in compliance with the statute as long as it does not violate any of its provisions. Since its discharges cannot violate any effluent standards or limitation until after such a standard has become effective, defendant's earlier discharges are not prohibited by the Act; defendant is therefore in compliance with the statute.

Id. at 1042.

Although this case was relied upon in *Frezzo* by the defendant, Brief for Appellant at 12, the government did not consider *Stream Pollution Control Board* as inconsistent with its own position. Brief for Appellee at 4. The government noted that, in *Stream Pollution Control Board*, the discharges in question occurred before the section 1311(b) effective date of July 1, 1973. Also, defendant there was presumed to have made timely application for a permit, unlike the defendants in *Frezzo*. *Id.* at 4-5.

a result, the court stated, would mean that discharges would be totally prohibited until an effluent limitation was promulgated. Thus, the effluent limitation would act as a license to pollute. If this interpretation were followed, the court stated, passage of the act would demand "total purity . . . forthwith only to be succeeded by various stages of impurity."¹⁶⁶

However, the Seventh Circuit later found its interpretation in *Steam Pollution Control Board* not to be controlling.¹⁶⁷ Total purity need not be required forthwith because, as the court noted in the later case, permits could be issued regardless of the nonexistence of applicable regulations.¹⁶⁸

Although the *Frezzo* holding on the issue of effluent limitations is correct, the court's opinion does not sufficiently analyze the problem of what criteria should govern whether today's first-time permit applicant should be given immunity during the pendency of a permit application. According to the *Frezzo* decision, a "potential transgressor"¹⁶⁹ of the act has an affirmative obligation to apply for a discharge permit regardless of the existence or absence of effluent limitations. The court stated that in appropriate circumstances application for a permit could protect an applicant from suit during the pendency of the application.¹⁷⁰ As authority for this proposition, the court cited section 1342(k)¹⁷¹ of the FWPCA and *Stream Pollution Control Board*.¹⁷² However, in reality, the permit applicant is protected from suit only to the extent of the

166. 512 F.2d at 1042-43.

167. *United States Steel Corp. v. Train*, 556 F.2d 822, 830 n.3 (7th Cir. 1977).

168. *Id.* at 844.

169. 602 F.2d at 1128.

170. *Id.*

171. Section 1342(k) provides:

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge had been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

33 U.S.C. § 1342(k) (1976).

172. 512 F.2d 1036 (7th Cir. 1975); see notes 163-66 *supra* and accompanying text.

administrator's grace.¹⁷³ Neither of the authorities relied upon by the *Frezza* court would have protected defendants even if they had had a permit pending. Section 1342(k) would not have offered protection because that section provides that a permit applicant is shielded from enforcement action during the pendency of the application until December 31, 1974.¹⁷⁴

Stream Pollution Control Board does not offer protection because the facts in that case concerned a permit application prior to December 31, 1974.¹⁷⁵ Neither *Stream Pollution Control Board* nor section 1342(k) considers the question of liability where a permit was applied for after December 31, 1974. Consequently, it is unlikely that either of these authorities, relied upon in *Frezza*, provides assurance that a discharger who applies for a permit today will be shielded from liability during the pendency of the application. Therefore, the *Frezza* interpretation appears to leave to the administrator's discretion whether a particular application is surrounded by the "appropriate" circumstances¹⁷⁶ meriting immunity from suit during permit pendency. If the circumstances were not appropriate for immunity, the administrator could refuse to establish temporary operating conditions and/or bring suit.¹⁷⁷ Either of these actions could lead to the shut down of the applicant's business.¹⁷⁸ Furthermore, even if the EPA were to refrain from enforcement action, a polluter would remain liable to a civil action brought by a private citizen.¹⁷⁹ However, these possibilities do not refute the correctness of the *Frezza* holding to the effect that effluent limitations are not a prerequisite to enforcement.¹⁸⁰ Occasional harsh

173. Consider section 558 of the Administrative Procedure Act, which offers some support that applicants should be given immunity during pendency. 5 U.S.C. § 558 (1976). That section provides that where a licensee has made timely and sufficient application for a new license, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined. However, this provision applies to renewals, not first-time applicants.

174. See note 171 *supra*.

175. See 512 F.2d at 1038 n.2.

176. 602 F.2d at 1128.

177. Cf. *Marathon Oil v. EPA*, 564 F.2d 1253, 1275-76 (9th Cir. 1977) (Wallace, J., dissenting), where the majority found that due process requirements were met by EPA procedures. *Id.* at 1265. In dissent, Judge Wallace stated that "the EPA's refusal to issue the necessary permit would require petitioners to cease operations. . . . I cannot agree that the EPA has the power to force the termination of an ongoing business by means of a procedure that does not meet due process standards." *Id.* at 1275-76.

178. *Id.*

179. *Id.* at 1273; *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir.), *cert. denied*, 430 U.S. 975, (1976), where the court stated that "[w]hile a citizen must give the EPA advance notice of his intention to sue, there is no authorization to block a citizen's suit under section [1365] even though the agency believes that the suit should not go forward." *Id.* See note 105 *supra*.

180. See *Bethlehem Steel Corp. v. Train*, 544 F.2d 657 (3d Cir.), *cert. denied*, 430 U.S. 975 (1976), relied upon by the district court in *Frezza*. 461 F. Supp. at 269. In *Bethlehem Steel*, the

results such as those described above were foreseen by the drafters of the legislation.¹⁸¹ Amelioration of the impact of the FWPCA lies with Congress, not with the courts.¹⁸²

The other defense raised by the defendants in *Frezzo*, that section 1319(a)(3) imposes a mandatory duty upon the administrator to issue an abatement order prior to seeking criminal remedies, was also correctly decided by the *Frezzo* court. If an abatement order were required as a prerequisite to criminal prosecution, it would not limit civil liability, but it would impose a nearly insurmountable impediment to criminal enforcement. For example, assume that as a prerequisite to criminal action the administrator had issued an abatement order which required the defendants in *Frezzo* to comply with the act in thirty days. Despite that order, the defendants would still be civilly liable for all pollution discharges prior to issuance of the order as well as those which continued while the abatement order was in effect.¹⁸³ This follows because the only event that cuts off civil liability is a cessation of illegal discharges.¹⁸⁴ Therefore, the issuance of an abatement order still would have left the defendants in *Frezzo* open to enforcement action. However, criminal action would be foreclosed no matter how wilfully or negligently dischargers continued to pollute up to the time of the compliance date. Such an interpretation of the act would make criminal provisions useless appendages. This would contradict the plain congressional intent that the FWPCA strengthen criminal enforcement as compared to that available in earlier legislation.¹⁸⁵ Furthermore, if there were such a prerequisite to criminal action, it would impose upon the EPA an additional administrative procedure. This

court held that the EPA was without authority to grant an extension beyond a statutory compliance date even though by that date the administrator had not yet promulgated applicable regulations. 544 F.2d at 663.

181. See *id.* at 662-63, where the court stated that Congress had "opted to take" the risk that "harsh consequences could ensue" under environmental statutes. See also *Union Electric Co. v. EPA*, 427 U.S. 246, 269 (1976) (Clean Air Act).

182. 544 F.2d at 663.

183. See *United States v. Detrex Chem. Indus., Inc.*, 393 F. Supp. 735, 736 (N.D. Ohio 1975); note 108 *supra*.

184. 393 F. Supp. at 736.

185. See S. REP. NO. 414, 92d Cong., 2d Sess. 64-65, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS. 3668, 3730-31, where the committee report stated:

Under the Refuse Act the Federal government is not constrained in any way from acting against violators. The Committee continues that authority in this Act.

The Committee further recognizes that sanctions under existing law have not been sufficient to encourage compliance with the provisions of Federal Water Pollution Control Act. Therefore, the Committee proposes to increase significantly the penalties for knowing violations would [sic] be subject to penalty of \$25,000 per day or imprisonment for one year or both.

conflicts with the stated policy of the act which provides that unnecessary delays and paperwork should be avoided.¹⁸⁶

Another factor supporting the *Frezza* court's interpretation of the act that there be no 1319(a)(3) prerequisite to criminal prosecution is that the Senate version of the FWPCA was specifically amended by the House so that the administrator was "authorized rather than required" to initiate civil actions.¹⁸⁷ This accession to the House by the Senate was correctly noted and relied upon by the court.¹⁸⁸

The *Frezza* decision that neither effluent limitations nor notice of a violation is a prerequisite to criminal suit streamlines enforcement. The impact of this resolution is that a discharger is expected to know that he is in violation of the act, despite the absence of applicable regulations spelling out permissible conduct. Considering the specific facts involved in the *Frezza* case, this does not seem like an overly harsh result. In *Frezza*, defendants knew of and did nothing to prevent the spillage of thousands of gallons of feces-laden water into a stream.¹⁸⁹ As fecal matter is probably the oldest water pollutant known to man, the finding of criminal liability in *Frezza* does not seem unjust.¹⁹⁰ If a

186. See 33 U.S.C. § 1251(f) (1976).

187. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 132, reprinted in [1972] CODE CONG. & AD. NEWS 3776, 3809.

188. See text accompanying note 136 *supra*.

189. See Brief for Appellee at ix-xvi. At trial, the discharged wastes were described as having a "very characteristic dark brown color. They are malodorous. They smell like manure. And sometimes their consistency var[ies] from that of watery to nearly sludge-like." *Id.* at ix.

190. The defendants in *Frezza* raised another defense in a petition to the Third Circuit for a rehearing after the court's opinion was handed down. The defense raised there was that the defendants were exempt from the permit program because the discharges for which they had been convicted were the result of exempt agricultural activities. This claim of exemption rested upon 40 C.F.R. 125.4(i) (1978), which provides:

The following do not require an NPDES Permit:

(i) Water pollution from agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:

(3) Discharges from agricultural point sources as defined in § 125.53.

Section 125.53, defining agricultural activities, provides:

(a) Definitions. For the purpose of this section:

(1) The term "agricultural point source" means any discernible, confined and discrete conveyance from which any irrigation return flow is discharged into navigable waters.

(a) The term "irrigation return flow" means surface water, other than navigable waters, containing pollutants which result from the controlled application of water by any person to land used primarily for crops, forage growth, or nursery operations.

40 C.F.R. 125.53 (1979). The 1977 amendments to the FWPCA include a section which appears to have drawn from code regulation section 124.4(i):

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

33 U.S.C. § 1342(l) (Supp. 1977). Although neither the above statute nor section 124.4(i) have been the subject of judicial interpretation, an antecedent regulation was invalidated on the

situation were to arise where a defendant could not have been expected to know that he was polluting, there likely would not be a finding of criminal liability because the violation would not have been "wilful or negligent" and hence would not satisfy the scienter requirements of section 1319(c).¹⁹¹

CONCLUSION

Enforcement of section 1311(a) of the FWPCA on a *per se* basis places upon polluters the burden to apply for a permit to determine whether they come within the scope of the act. After *Frezza*, failure to meet this affirmative duty may lead to criminal penalties in the first instance. This does not seem an unfair burden to place upon dischargers considering that the act has been law for eight years. Moreover, the date by which all discharge of pollutants is to cease is less than five years away. If the FWPCA is to be a potent weapon with which to end water pollution, polluters not in compliance with the act should be subjected to the full force of the penalties provided therein. Cases such as *Frezza* prepare the way for imposition of these penalties.

SHARON NELSON KAHN

grounds that the EPA lacked authority to exempt agricultural point sources from the permit requirement. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977); *see* 40 C.F.R. 125.4 (1975) (invalidated).

The Third Circuit in *Frezza* denied without comment the defendants' petition for rehearing. The agricultural exemption issue was raised again on petition for certiorari, which was also denied. 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980). On March 14, 1980, defendants filed a motion to vacate and set aside the sentence pursuant to 28 U.S.C. § 2255 (1976) or, alternatively, for a writ of error coram nobis. This motion was pending at the time of publication of this article.

191. *See* text accompanying note 54 *supra*.